

Supreme Court, U.S.
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No. 86-1515

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT ONG HING and ALICE HING,
Petitioners,

vs.

HARVEY R. McELHANON and
DOREEN T. McELHANON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF ARIZONA

PETITIONERS' REPLY MEMORANDUM

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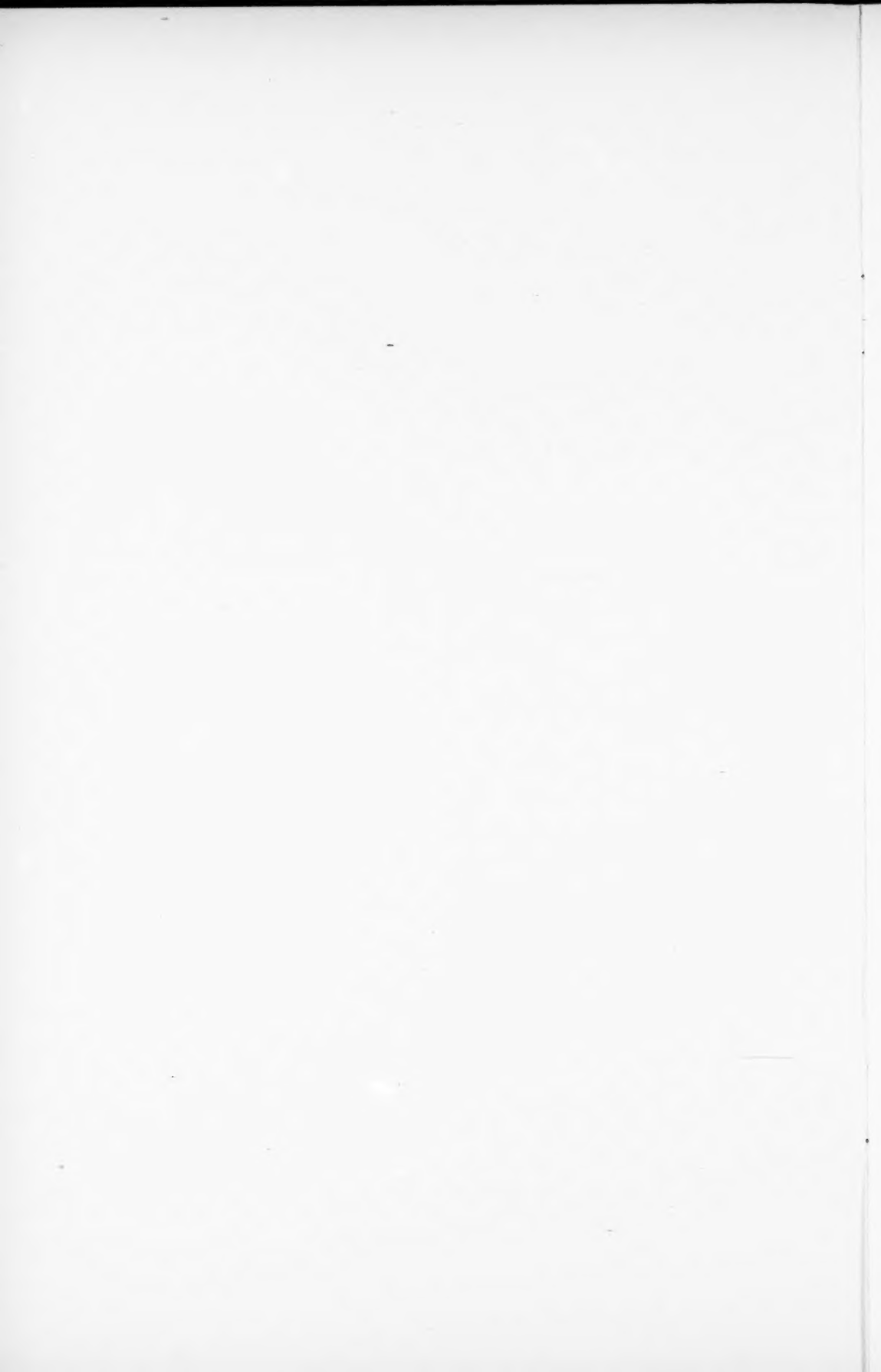


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In their Brief in Opposition respondents concede the basic point raised by petitioners, namely that if a state grants its citizens the right of appeal, the state must act without discrimination in accord with federal due process. (Respondents' Brief in Opposition, p. 11.) Respondents contend however, that the Arizona Supreme Court disposed of petitioners' issue number seven. This is not true. To begin, there is no contention that the Arizona Court of Appeals reviewed issue seven. In fact, it expressly declined to reach issue number seven:

Because we have determined to reverse, we need not consider the final issue raised in the opening brief which deals with prejudicial statements by McElhanon and the introduction of inadmissible evidence against Hing. With proper control these matters should not arise in any retrial of this case.

(Petitioners' appendix, p. A-48.)

Nor did the Arizona Supreme Court decide issue seven. First, it expressly limited its review to specific questions pertaining only to issue number six. (Petitioners' appendix, pp. A-52, A-54.) Second, it approved the Court of Appeals' decision that did not reach issue seven:

We approve the decision of the Court of Appeals except as to its determination that reversal was required because of ex parte communications. That portion of the opinion is vacated. The judgment of the trial court is affirmed.

(Petitioners' appendix, pp. A-17-A-18.)

Third, under the requirements of the Arizona Constitution, Article 6, § 2, the Supreme Court could not have decided issue seven without setting forth in its opinion its reasons for doing so. The Arizona Constitution guarantees litigants that "[t]he decisions of the [Supreme] court shall be in writing and the grounds stated." Ariz. Const., Art. 6 § 2. The Arizona Supreme Court has stated:

The Constitution requires that the Court's decision be in writing and the ground stated. Art. VI. Sec. 2. Certainly, parties to litigation are entitled to be advised of the reasons persuading the Court to its conclusion. Equally certain, the decision need not contain a seriatim rebuttal of points made or arguments advanced. Enlargements upon the ground of decision ought to be limited to matters where areas of genuine dispute exist.

Lines of distinctions can be drawn. Some cases present problems where principles sought to be applied have not been settled or accepted. These provoke bitter disagreements, and, consequently, often demand extensive analysis and exhaustive discussion. Others, however,

simply present the question whether the cause is controlled by one or another of previously announced rules. These do not require extended treatment for the arguments have been recognized and met in former decisions or distinctions sought to be drawn are clearly negated by objective examination of the holding in the case. Such a case is petitioner's. We said that the questions for determination were not novel. Hence, the case could be and was disposed of summarily.

Phelps Dodge Corporation v. The Industrial Commission of Arizona, 90 Ariz. 379, 381, 363 P.2d 450, 452 (1962). Thus, even if it were presumed that the Supreme Court of Arizona somehow, by implication, decided issue number seven, and there is nothing in its opinion to support that presumption, any such implied decision would be in violation of the Arizona Constitution.

The Arizona cases acknowledge the importance of the right of appeal. "The right to appeal is part of the substantive law of the state. It can only be given or denied by constitution or the legislature of the state." *State v. Birmingham*, 96 Ariz. 109, 110, 392 P.2d 775, 776 (1964). "The substantive right to appeal is statutory and [the state Supreme] court may not diminish or alter that right." *Matter of Pima County Juvenile Action*, 135 Ariz. 278, 280, 660 P.2d 1205, 1207 (1982). In petitioners' case, the Arizona Supreme Court's disregard of issue number seven has diminished and, in fact, abrogated the petitioners' right to a full appeal.

Respondents' second argument, namely that when the Arizona Supreme Court affirmed the judgment of the trial court, all of petitioners' assignments of error were finally adjudicated against them, thereby becoming the law of the case, underscores the unfairness to petitioners of the Arizona Supreme Court's action in this case. If this Court declines the petition for certiorari, petitioners will have no

forum in which to assert issue number seven. That issue will be merged in the final judgment.

[W]hen a court of last resort renders a final judgment, either by affirming the court below or by reversing without remand, it is deemed to have passed upon all issues of law which were raised or which might have been raised . . .

Harbel Oil Company v. Superior Court of Maricopa County, 86 Ariz. 303, 307, 345 P.2d 427, 430 (1959). Petitioners will thus have exhausted their right to appeal without ever having received review of issue seven.

Only by the grant of certiorari in this case will the petitioners have an opportunity to receive the review to which they are entitled.

Conclusion

Petitioners respectfully request this Court to grant their petition and review the opinion and order of the Arizona Supreme Court.

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